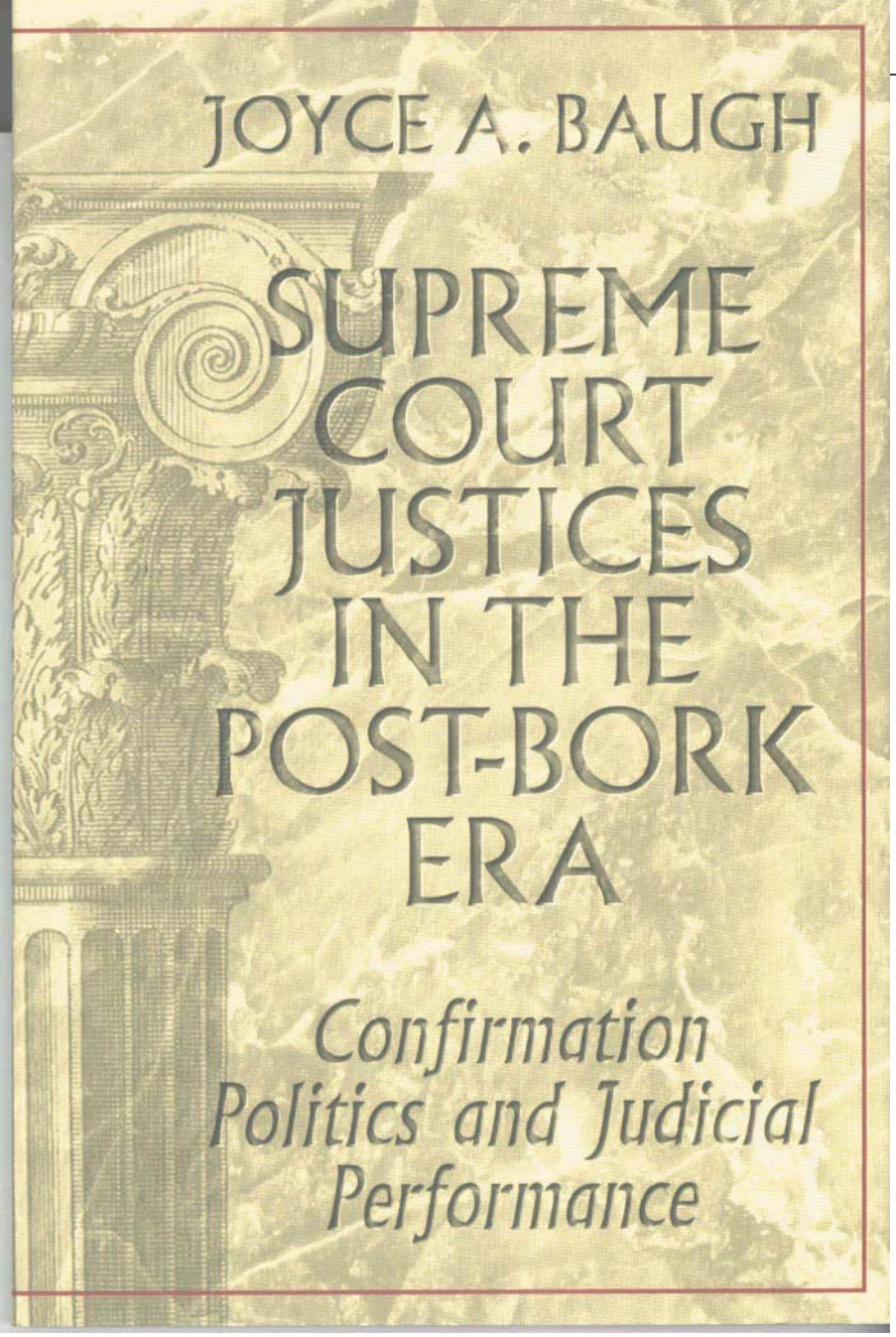
JOYCE A. BAUGH
SUPREME COURT JUSTICES IN THE POST-BORK ERA
Confirmation Politics and Judicial Performance

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CONFIRMATION POLITICS AND JUDICIAL PERFORMANCE

PETER LANG
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Introduction

The appointment of justices to the United States Supreme Court has always been a topic of considerable interest to academics, legal observers, and the media. This especially has been true since the controversial nomination of federal appeals court judge Robert Bork in 1987. Since the appointment of Stephen Breyer in 1994, there has been no vacancy on the Court, and the assumption is that George W. Bush may have the opportunity to appoint as many as three justices. For several years, rumors in political and legal circles have suggested that Chief Justice William Rehnquist and Justice Sandra Day O'Connor are interested in retiring but have been hoping to time their departures so that their successors could be named by a Republican president. Some also have mentioned that Justice John Paul Stevens, the oldest of the sitting justices, may retire in the near future.

Supreme Court observers continually have speculated about whether future nominations would be marked by the rancor and controversy that characterized the Bork (and subsequent Clarence Thomas) confirmations. Immediately after the Bork nomination was defeated in 1987, critics claimed that the confirmation process had become politicized. They downplayed the role of politics in President Reagan's selection of Bork and blamed liberal interest groups and liberal senators for the acrimonious proceedings. Such claims about the new "politicization" of the process were overblown, however. In his comprehensive study of Supreme Court appointments beginning with George Washington's administration, Henry Abraham presents strong evidence that politics always has played an important role in the appointment of Supreme Court justices. He discussed several factors that affect presidential selection of nominees: (1) objective merit (2) personal friendship (3) balancing representation or representativeness on the Court, and (4) political and ideological compatibility. He concludes that political and ideological compatibility has been "the controlling factor."[1]

Despite clear evidence of the long-term role of politics in Supreme Court appointments, claims about the politicization of the process were widespread, and a task force was established to examine the process and propose reforms. In its report issued in 1988, the Twentieth Century Fund suggested these reforms: (1) limits on the number of participants in the confirmation hearings, (2) preventing nominees from testifying at confirmation hearings, (3) if nominees testify, preventing senators from asking questions regarding how they would deal with specific issues, and (4) basing confirmation decisions on nominees' written records and testimony from legal experts.[2] Other legal experts offered additional reform proposals, including having the nominees testify immediately upon the nomination and delaying testimony from others, prohibiting testimony from groups, prohibiting televised hearings, banning public hearings, and doing away with hearings altogether.[3]

The controversy over the Bork nomination (and the Thomas confirmation in 1991) generated a proliferation of publications analyzing the Supreme Court appointment process. In *The Confirmation Mess,* Stephen Carter examined several high-profile nominations for appointments to federal office, giving particular attention to Bork and Thomas. Carter decried the system of confirming nominees for federal office as one "in which strategy (especially public relations strategy) is far more important than issues or qualifications."[4] While recognizing that "vicious confirmation battles" are not a new phenomenon, he alleged that the proceedings are "rougher" today because televised hearings have transformed these events from "inside-the-Beltway rituals into full-blown national extravaganzas."[5] Carter concluded by critiquing various proposals to reform the process. He rejected most of these as ineffective in really improving things: prohibiting confirmation hearings from being televised; closing the confirmation hearings or discontinuing them; discontinuing testimony from nominees; and prohibiting testimony from interest groups. As better alternatives, he advanced proposals that would require constitutional amendments, including changing the vote necessary for confirmation from a simple majority to a 2/3 vote, imposing term limits for Supreme Court justices, and electing Supreme Court justices.[6]

Mark Silverstein, in *Judicious Choices: The New Politics of Supreme Court Confirmations,* maintained that the appointment process changed in a dramatic way long before the Bork episode, with Lyndon Johnson's failed nomination of Abe Fortas for chief justice in 1968. He attributed the increased contentiousness of the process to systemic factors, including changes in the nature of judicial power, the changing roles of the national parties, and changes in the structure and operation of the Senate. According to Silverstein, as the Supreme Court increasingly issued decisions to protect civil liberties and civil rights, progressives turned to the federal judiciary to protect their interests. This in turn had profound effects on the selection of Supreme Court justices.

> The litigation victories of the New Progressives in turn hastened the emergence of the New Right in the Republican Party and gave rise to intense scrutiny of judicial appointments by powerful forces in both parties. The changes in the nature of judicial power over the last three decades ratcheted the stakes still higher by making the federal judiciary amenable to a wider range of litigants and claims. . . . Changes in the formal rules and institutional folkways of the Senate enhanced the influence of individual senators at the expense of institutional cohesion and leadership control. By the late 1960s these developments converged, making public battles over staffing the Supreme Court almost inevitable.[7]

In *Shaping America: The Politics of Supreme Court Appointments,* George Watson and John Stookey acknowledged that the selection of Supreme Court justices inevitably is a political, ideological, and controversial process, but, in contrast to some other commentators, they do not find this problematic. In fact, they suggested that it *should* be this way, given the critical role the Court plays in deciding important policy questions. Watson and Stookey argued that both presidents and senators recognize the political nature and implications of Supreme Court appointments and that they simply should be honest about this.

> Who is on the Court is an important political question. Explicit political conflict about a nominee should be considered legitimate and appropriate. Senators should not ignore questions of ethics, competency, or temperament, but they should be encouraged to jettison attempts to wrap their support or opposition in these terms if in fact their objections are grounded in political and ideological objections. . . . [A]n explicitly political process would, we believe, actually civilize the nomination process.[8]

John Anthony Maltese, in *The Selling of Supreme Court Nominees,* also accepted the inevitability of the political nature of the Supreme Court appointment process. Beginning with George Washington's nomination of Associate Justice John Rutledge for Chief Justice in 1795, Maltese demonstrated that there have been controversial nominations throughout American history. Other examples from the late nineteenth and early twentieth century included Rutherford B. Hayes's nomination of Stanley Matthews in 1881, Woodrow Wilson's nomination of Louis Brandeis in 1916, and Herbert Hoover's nomination of Associate Justice Charles Evans Hughes for Chief Justice in 1930. Through examination of these appointments, along with in-depth case studies of the failed nominations of John Parker in 1890 and Clement Haynesworth, Jr. in 1969, Maltese demonstrated that partisan politics and interest group influence in Supreme Court appointments did not begin in 1987 with the nomination of Bork. Like Silverstein, he emphasized that the process has become more political over time because of important changes in the political system. He pointed to the emergence of interest groups in the appointment process, rule changes in the Senate that opened debate on nominations, and the ability of interest groups to have a greater influence on senators as

a result of direct election. Maltese's major thesis is that the process now requires the "selling" of nominees.

> [W]hat is different about today's appointment process is not its politicization but the range of players in the process and the techniques of politicization that they use. Today's confirmation battles are no longer government affairs between the president and the Senate; they are public affairs, open to a broad range of players. Thus, overt lobbying, public opinion polls, advertising campaigns, focus groups, and public appeals have all become a routine part of the process.[9]

Clearly the Bork nomination was not the first controversial Supreme Court appointment, but it certainly seemed unprecedented in terms of the level of attention and participation it generated. Senators engaged in greater scrutiny and questioning of a nominee than ever before, and the number of interest groups participating in the process reached an all-time high. The hearings lasted twelve days, with nearly five days of testimony from the nominee himself, and, in the end, senators rejected his confirmation by the largest margin in history.

Scholars and other commentators from across the political spectrum have predicted that the Bork controversy would have a long-lasting impact on the appointment process in two important ways. First, Supreme Court nominations in the future would be marked by a significant increase in both media attention and interest group participation. Second, and perhaps more importantly, observers predicted that presidents would be more likely to appoint either "stealth" nominees–that is, individuals who share their ideological perspectives but lack a "paper trail" of controversial writings and speeches—or judicial moderates who would be less likely to evoke serious opposition from those on either side of the political and ideological spectrum.

This study examines these predictions about the impact of the Bork controversy by focusing on the four subsequent nominations to the Supreme Court: David Souter, Clarence Thomas, Ruth Bader Ginsburg, and Stephen Breyer. The study examines the nomination and confirmation process for each of these justices and also looks at their subsequent performance on the Court. Have they been judicial moderates, or have they demonstrated ideological consistency in either a conservative or liberal direction? The first chapter discusses the Bork nomination controversy in more detail. The next four chapters focus on each of the four subsequent nominees in order of their appointment to the Court. A concluding chapter offers speculation about the future of Supreme Court nominations, considered in light of current power dynamics in the U.S. Senate. At the beginning of George W. Bush's term as president in January 2001, the Senate was equally divided, with Vice President Dick Cheney in a position to cast tie-breaking votes. Questions immediately arose about the types of nominees that Bush would select under these circumstances. Four months later, however, Republican Senator James Jeffords of

Vermont announced that he was leaving the party to become an Independent. Subsequently, Jeffords joined the Democratic caucus, providing Democrats with a working majority and, most importantly for this study, control of the Senate Judiciary Committee. This new scenario makes speculation about the future all the more interesting to observers of the Supreme Court appointment process.

CHAPTER ONE

The Bork Confirmation Controversy

On June 26, 1987, the final day of the 1986–1987 term, Associate Justice Lewis Powell announced his retirement from the Supreme Court. During his fifteen-year tenure, Powell had earned a reputation as a moderate, "swing voter" on the high court. Although Janet Blasecki's comprehensive study of Powell's voting record indicates that he most often was aligned with the Court's conservatives,[1] Powell was viewed as a moderate because in landmark cases he often cast the decisive vote for both conservative and liberal outcomes. For example, he joined the conservatives in creating a "good-faith exception" to the Fourth Amendment exclusionary rule, in limiting the power of federal judges to issue broad busing orders to remedy metropolitan school desegregation, and in upholding a state's property tax scheme of school financing over claims that the resulting disparities violated the Equal Protection Clause.[2] On the other hand, Powell voted with the liberals in striking down policies that denied public education to the children of illegal aliens, that provided public funds for religious schools, and that permitted "victim impact statements" to be used in sentencing decisions in capital cases.[3]

Of particular interest to Court observers was Powell's position on abortion. He was a member of the original *Roe v. Wade* majority, and in subsequent cases he consistently voted to uphold this precedent.[4] Powell also played a pivotal role as author of the controlling opinion in a number of major cases, most notably, the *Bakke* affirmative action case. In *Bakke,* the justices were split 4–4 over the validity of a medical school's admissions program which had set aside a specific number of seats for minority and disadvantaged applicants. In the controlling opinion, Powell, finding a middle ground, held that a strict quota was invalid, but that race could be considered as a factor in admissions decisions.[5]

While the selection of a new justice is always a subject of great interest, Powell's reputation and the dynamics on the Court made this nomination one of extra significance. Only a year earlier, Chief Justice Warren Burger had retired, Associate

Justice William Rehnquist was selected to succeed him, and Antonin Scalia was appointed to fill Rehnquist's seat. While those nominations were not completely without controversy, the Court's ideological balance was not altered because conservative justices were succeeded by conservatives. With Powell's retirement, however, it was clear that the new appointee would tip the balance on the closely divided Court.

The nomination drew attention from activists and interest groups on both the left and right. Conservatives assumed that President Reagan would appoint a justice who would help to form a majority that would finally overturn what they considered to be the liberal excesses of the Warren and Burger Court eras. Liberals were determined to keep a strong conservative off the Court in order to preserve important precedents in such areas as abortion, the First Amendment, criminal procedure, voting rights, and affirmative action.

The Selection of Robert Bork

Reagan administration officials struggled over who the president should select to fill Powell's seat. Federal appeals court judge Robert Bork was championed by conservatives in the Justice Department, particularly Attorney General Edwin Meese, Assistant Attorney General William Bradford Reynolds, and their immediate subordinates. Conservatives believed that a Bork nomination was overdue and that Bork, rather than Antonin Scalia, should have been the choice a year earlier.[6] In fact, as early as 1975, conservatives had suggested Bork as a nominee when President Gerald Ford selected federal appellate judge John Paul Stevens to succeed Justice William O. Douglas.[7] By contrast, the more moderate members of the White House staff, including Chief of Staff Howard Baker, White House Counsel Arthur B. Culvahouse, and Communications Director Thomas Griscom, were of a different mind. They were concerned that Bork's well-established record as a hard-line conservative would create a confirmation battle that the administration needed to avoid.[8] The conservatives prevailed, however, and on July 1, 1987, President Reagan announced Robert Bork as his nominee to fill the vacant seat. At the time, Bork was serving on the federal court of appeals for the District of Columbia circuit, to which he had been appointed in 1982. This court is regarded by many legal experts as the second most important court in the nation because of its role in handling important administrative law matters regarding federal agencies.

Bork's Background

Robert Bork, the son of a steel company purchasing agent and an English teacher, was born in Pittsburgh, Pennsylvania on March 1, 1927. He attended

Pittsburgh public schools until his senior year, when his parents enrolled him in an exclusive prep school in Connecticut. Although Bork eventually became a leading advocate of free market conservatism, as a teenager he was interested in socialism as a result of reading a Marxist analysis of capitalism. After graduating from high school, Bork joined the Marine Corps shortly before the end of World War II. He served for two years and subsequently entered the University of Chicago, where he earned his bachelor's degree in 1948. Following his undergraduate studies, Bork entered the University of Chicago Law School, but his legal education was interrupted when he was called to service as a Marine reserve at the outbreak of the Korean War. He served as a first lieutenant from 1950 to 1952, then returned to Chicago to continue his legal education, completing his J.D. in 1953. During his last year of law school, Bork's philosophy began to shift away from socialism due to the influence of one of his professors who advocated free-market conservatism. After receiving his law degree, Bork worked for one year as a research associate at the University of Chicago Law School before going to work in private practice, first in New York and then in Chicago. He developed a specialty in antitrust law. In 1962, he joined the faculty at Yale Law School, where he initially taught antitrust law and later added courses in constitutional law. His political philosophy continued to develop during this time. Bork, an earlier supporter of Democratic presidential candidates, supported conservative Republican Barry Goldwater for president in 1964. He was one of few faculty members at Yale to do so publicly. Bork's writings during his early years at Yale generally reflected libertarian principles, but by the late 1960s and early 1970s, as American society became increasingly conservative, his philosophy changed from libertarian to social conservative.[9]

As Bork developed a specialty in constitutional law, he rejected the expansive interpretation of the Constitution that had been the hallmark of the Warren Court. He eventually espoused an approach of original intent, which emphasizes that the provisions of the Constitution must be interpreted according to the intentions of the framers.[10] According to its advocates, the original intent approach is necessary to prevent judges from "making law," which is the proper purview of legislators and executives. The philosophy of original intent, or originalism, as the proper method of constitutional interpretation became a subject of great debate and controversy during the early- to mid-1980s. One of its most well-known proponents was Reagan Attorney General Edwin Meese, who became engaged in a debate with Justice William Brennan over the appropriateness of original intent as a method of constitutional interpretation.[11] Those who adhere to originalism insist that it is neutral and nonpolitical, but this approach generally supports conservative positions on constitutional issues.[12] Thus advocates of original intent are highly critical of liberal precedents established in Supreme Court decisions during the Warren and, to a lesser extent, Burger eras.

Bork's writings captured the attention of conservatives in the Nixon Administration, who also were disturbed by the Court's decisions in a number of areas. In fact, President Nixon had campaigned on the theme of appointing "law and order" justices who would overrule the liberal precedents that, in the view of conservatives, were destroying the fabric of American society. Early in Nixon's second term in 1973, Bork was nominated to become United States Solicitor General. Only two months after being appointed as the federal government's top attorney, he gained notoriety for his participation in the infamous "Saturday Night Massacre." Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus both refused to follow President Nixon's order to fire Archibald Cox, the special prosecutor investigating the Watergate affair. After their resignations, Bork agreed to serve as acting attorney general and carried out the order.[13]

Bork served as solicitor general until January of 1977, when, following Jimmy Carter's presidential victory, he again joined the faculty of Yale Law School. Four years later, he returned to private practice, becoming a senior partner in the Washington office of his old Chicago firm. His private practice work was short-lived, however, as President Reagan nominated him for a judgeship on the D.C. Circuit Court in 1982. He received the ABA's highest rating and was confirmed by the Senate with a unanimous vote.[14]

On the D.C. Circuit, Bork developed a reputation as a strong conservative judge. His opinions on the appellate court sometimes contained sharp criticisms of Supreme Court precedents, although his record in this regard was not as extensive as his other writings and speeches.

The Controversy Begins

Within a few hours after President Reagan announced Judge Bork's nomination to the high court, Senator Edward Kennedy of Massachusetts delivered a sharp attack on Bork in a speech on the floor of the Senate.

> Robert Bork's America is a land in which women would be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, school children could not be taught about evolution, writers and artists could be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is—and is often the only—protector of the individual rights that are the heart of our democracy.
>
> [I]n the current delicate balance of the Supreme Court, his rigid ideology will tip the scales of justice against the kind of country America is and ought to be.[15]

In addition, shortly after the nomination was announced, liberal interest groups sprang into action to block the confirmation. Under the leadership of Ralph Neas,

director of the Leadership Conference on Civil Rights, activists mobilized for an all-out, no-holds-barred campaign to persuade the Senate to reject Bork. Over 150 groups representing a variety of interests took part in this effort that began well before the confirmation hearings and continued until the nomination was defeated. This included such well-known civil rights groups and labor organizations as the National Council of Churches, NAACP Legal Defense and Educational Fund, American Civil Liberties Union, the Urban League, National Education Association, United Auto Workers, AFL-CIO, National Council of La Raza, National Organization for Women, and People for the American Way. Despite their disagreements over specific issues, the leaders of these groups set aside their differences to unite in opposition to Bork's confirmation. Instead of engaging in traditional public protests and demonstrations, these activists used a sophisticated media strategy involving targeted radio announcements, video news releases, and newspaper advertising. The idea was to influence the constituencies of key senators to oppose Bork, and these constituents then could pressure their leaders to vote against confirmation.[16]

Bork's opponents characterized him as an extremist, out-of-the-mainstream judge who was out of step with basic American values, but the Reagan administration sought to recast him as a moderate with impeccable credentials for service on the high court. This strategy was developed by the moderate wing of the administration, particularly members of the White House staff, against the wishes of the Justice Department conservatives. The moderates believed that two groups of senators were the key to Bork's confirmation: conservative southern Democrats and moderate northern Republicans. In their view, these senators "had to be told of Bork's credentials, of his deference toward legislators, of his mainstream and distinguished career as a federal judge, one never reversed by the Supreme Court. In other words, Bork's strong association with the right had to be played down and his stature within the legal profession played up."[17] A major problem, however, was Bork's rating from the American Bar Association's Standing Committee on the Federal Judiciary. On a fifteen person-committee, ten members gave him the highest rating of "well-qualified," four concluded he was "not qualified," and one voted "not opposed." Reagan administration officials and sympathetic senators responded by arguing that the "not qualified" votes should be discounted because they were given by four liberals who simply were opposed to Bork's views. They also noted that in his nomination to the federal appeals court a few years earlier the ABA committee unanimously had rated him "well qualified." Committee members justified the change as the result of different qualifications appropriate for lower court judges and Supreme Court justices.[18]

The Confirmation Hearings and Final Vote

Although the Reagan conservatives had hoped for quick action on the nomination once it was announced on July 1, the confirmation hearings before the Senate Judiciary Committee did not begin until September 15. Senate Judiciary Committee Chairman Joseph Biden was heavily criticized for the delay, but he contended that senators needed time to examine Bork's extensive record, and they did not want to spend time on the hearings during the month of August.[19] When the hearings finally began, Bork testified for nearly five days. Two of his earliest writings, a 1963 *New Republic* article and a series of lectures published in the *Indiana Law Journal* in 1971, figured prominently in the questioning. In the *New Republic* article Bork had criticized the public accommodations section of the proposed Civil Rights Act of 1964 as a violation of the rights of white business owners.

> The discussion we ought to hear is of the cost in freedom that must be paid for such legislation, the morality of enforcing morals through law, and the likely consequences for law enforcement of trying to do so. . . . Of the ugliness of racial discrimination there need be no argument. . . . But it is one thing when stubborn people express their racial antipathies in laws which prevent individuals, whether white or Negro, from dealing with those who are willing to deal with them, and quite another to tell them that even as individuals they may not act on their racial preferences in particular areas of life. The principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you proved stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.[20]

In the *Indiana Law Review* article Bork articulated his approach to constitutional interpretation. He emphasized that the Constitution protects rights only if they are addressed explicitly in that document. If not, Bork said that judges must leave these matters to legislatures to decide. He was especially critical of the Court's 1965 decision in *Griswold v. Connecticut,* which established a constitutional right of privacy. In addition, he advocated a narrow view of the First Amendment's free speech clause, asserting that only political speech is worthy of constitutional protection.[21]

Despite his strong conservative record, in his opening statement, Bork described himself as a moderate, and he expressed his eagerness to share his views with the Committee.

> My philosophy of judging, Mr. Chairman, as you pointed out, is neither liberal nor conservative. It is simply a philosophy of judging which gives the Constitution a full and fair interpretation but, where the Constitution is silent, leaves the policy struggles to the Congress, the President, the legislatures and executives of the 50 States, and to the American people.
>
> I welcome the opportunity to come before the committee and answer whatever questions the members may have. I am quite willing to discuss with you my judicial philosophy

> and the approach I take to deciding cases. I cannot, of course, commit myself as to how I might vote on any particular case and I know you would not wish me to do that.[22]

Bork was questioned about his views on a range of topics, including his philosophy of constitutional interpretation, the role of precedent, and various civil rights and liberties issues. While a significant portion of the questioning focused on the two articles described earlier, senators noted that Bork continued to express some of those views long after the articles were written, even after his appointment to the federal bench in 1982.

Seeking to reconcile his earlier statements with his claim of being a moderate who had no ideological agenda, Bork sometimes told the Committee that he was simply engaging in an academic debate. For example:

> SENATOR THURMOND. Judge Bork, much of the criticism lodged against you stems from articles and speeches attributed to you over the years which are critical of various rulings of the Supreme Court. Do you feel any distinction should be drawn between your private writings and any responsibilities you would have as a Supreme Court Justice?
>
> JUDGE BORK. As a professor, I felt free to—and indeed was encouraged to—engage in theoretical discussion. I primarily aimed my writing at Supreme Court decisions which I thought were not adequately explained—and explanation is the heart of judging. As a judge, you cannot be as speculative.[23]

Furthermore, in his previous speeches and writings, Bork maintained that judges should feel free to reverse Supreme Court precedents that they believe were incorrectly decided. In a 1985 speech, he said:

> I don't think that in the field of constitutional law, precedent is all that important. And I say that for two reasons. One is historical and traditional. The court has never thought constitutional precedent was all that important—the reason being that if you construe a statute incorrectly, the Congress can pass a law and correct you. If you construe the Constitution incorrectly, Congress is helpless. You're the final word. And if you become convinced that a prior court has misread the Constitution, I think it's your duty to go back and correct it.[24]

And just six months before being nominated to the high court, in a speech before the Federalist Society, Bork expressed similar sentiments. "Certainly at the least, I would think [an] originality judge would have no problem whatever in overruling a non-originality precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing the framers intended."[25] In his opening statement, however, Bork backed away from these strong statements.

> [A] judge must have great respect for precedent. It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done. It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires such careful thought.

> Times come, of course, when even a venerable precedent can and should be overruled. . . .
>
> Nevertheless, overruling should be done sparingly and cautiously. Respect for precedent is part of the great tradition of our law, just as is fidelity to the intent of those who ratified the Constitution and enacted our statutes.[26]

In backing away from his earlier claims, he argued that some decisions, no matter how badly reasoned, were long-settled and should not be disturbed.

> [I]f it [a prior decision] is wrongly decided—and you have to give respect to your predecessors' judgment on these matters—the presumption against overruling remains, because it may be that there are private expectations built up on the basis of the prior decision. It may be that governmental and private institutions have grown up around that prior decision. There is a need for stability and continuity in the law. There is a need for predictability in legal doctrines.[27]

In response to some questions about his prior statements, Bork said that he had changed his views on some issues. For example, Senator Strom Thurmond asked if he adhered to his earlier position that the First Amendment should be interpreted narrowly, to protect only political speech. Bork replied:

> Well, Senator, I should point out I am a little surprised that what was an academic exercise and engaging in a debate and trying out a theory has become somehow the core of my philosophy. The article itself said at the end that these remarks are intended to be tentative and exploratory. At the moment, I do not see how I can avoid them.
>
> My views have changed for the simple reason—I was looking for a bright-line test by which judges could decide which speech was protected and which was not. I have since become persuaded—in fact, I was persuaded . . . that the bright-line made no sense; it would be impossible to follow. . . .
>
> So my bright-line eroded, and I now think—I have for some time—first amendment protection applies to moral discourse, it applies to scientific speech, it applies to news, it applies to opinion, it applies to literature.[28]

One of the most heated exchanges occurred when Senator Kennedy questioned Bork about his earlier criticism of the public accommodations provisions of the Civil Rights Act of 1964.

> SENATOR KENNEDY. Given the two articles which you offered in 1963 and in 1964, when did you first publicly change your position on the Civil Rights Act?
>
> JUDGE BORK. I do not know if I did it in the classroom or not, I know that the first time–
>
> SENATOR KENNEDY. Publicly, you have written two important declarations. I think we are entitled to know if you were prepared to make those comments in public. I would be interested in when you made some public comment or statement. . . . I would be interested

> in when you might be able to indicate to us that you changed your position on the Civil Rights Act.
>
> JUDGE BORK. Well I think it is implicit in some of the things that I wrote earlier, but I first said it, I think, where it was written down at least, in a confirmation hearing in 1973.

Bork attempted to deflect additional criticism by pointing out his enforcement of rights for minorities when he was solicitor general and his shift away from libertarian principles that had influenced his opposition to the Civil Rights Act. Kennedy then criticized him for taking so long to repudiate publicly his earlier statements. The exchange continued.

> JUDGE BORK. Senator, I do not usually keep issuing my new opinions every time I change my mind. I just do not. . . .
>
> SENATOR KENNEDY. The point that I would make here is that you felt it was sufficiently important to publish your views at a time when we were having a national debate in the early part of the 1960's on civil rights legislation. We were having a national debate in 1968 on the whole issue of fair housing. We were having a national debate in 1972 on other civil rights legislation and you did not feel . . . sufficiently aroused in terms of your altered or changed views, that you were prepared to publish those views. I would just say I wish you had been as quick to publicize your change of heart as you were to broadcast your opposition.[29]

The issue of whether the Equal Protection Clause should apply to gender discrimination was another area of concern for some senators. Bork previously had said that the Clause never should have been extended beyond racial discrimination. He appeared to soften his position here as well.

> At the time I wrote about the equal protection clause, the Court had never extended the clause to women. But in addition to that . . . the Court was in the process of saying it applies to blacks, it applies to illegitimate children, it applies to somebody else, and they were picking groups—which I thought was a wrong way to apply it. I think you apply it by requiring a reasonable basis for any distinction made between individuals or groups. . . .
>
> In the case of gender, it will depend on the particular issue. . . . But in that sense, requiring a reasonable basis for any distinction made—yes, the clause applies to women; it applies to every person.[30]

On the issue of the constitutional right of privacy and the *Griswold* case, Bork adhered more closely to his original claims, but even here his language was less strident. Both in the *Indiana Law Journal* article and on later occasions Bork had criticized the decision as an example of judges imposing their own values to create constitutional rights rather than deferring to the legislature to make decisions over competing values. Senator Biden pressed him on this:

THE CHAIRMAN. [Y]ou suggest that unless the Constitution, I believe in the past you used the phrase, textually identifies a value that is worthy of being protected, then competing values in society, the competing value of a public utility, in the example you used, to go out and make money—that economic right has no more or less constitutional protection than the right of a married couple to use or not use birth control in their bedroom. Is that what you are saying?

JUDGE BORK. No, I am not entirely, but I will straighten it out. I was objecting to the way Justice Douglas, in that opinion, *Griswold v. Connecticut,* derived this right. It may be possible to derive an objection to an anti-contraceptive statute in some other way. I do not know.[31]

Bork emphasized again that decisions over these competing values should be left to legislatures, not to judges. Senators Biden and Kennedy kept asking whether he believed that a constitutional right of privacy exists. He continued to be critical of *Griswold* but did not clearly answer the question.

SENATOR KENNEDY. As I hear you, you do not believe that there is a general right of privacy that is in the Constitution.

JUDGE BORK. Not one derived in that [as developed in *Griswold*] fashion. There may be other arguments and I do not want to pass upon those.[32]

Bork's responses to many of the questions led Senator Patrick Leahy and other observers to suggest that he had undergone a "confirmation conversion" in order to gain Senate approval. The "confirmation conversion" language was fueled by documents submitted by Bork's opponents which explicitly compared his confirmation testimony with previous statements on various subjects.[33] One scholar noted later that after several days of testimony Bork had "contradicted much of what he stood for and for which he was nominated."[34]

During their questioning of Bork, several Republican senators, particularly Orrin Hatch and Alan Simpson, accused their colleagues of viciously attacking him and taking his statements out of context. Hatch complained, "Well, what I am concerned about is the way your record is being distorted, some of the inflammatory rhetoric; some of the, I think, unuseful and really false methodology being used."[35] These senators characterized Bork as a mainstream judge and not an extremist, as his opponents were insisting. Simpson argued,

[I]t seems to me so far that the extremism so far in this case and the extremist views and philosophy of Judge Bork, that the extremism is in the rhetoric of the opponents of Judge Bork. That is where it is to this point, and the stridency of that. . . . [W]e have and will have an opportunity to pursue this to find that we have a . . ."conservative judge" who exercises judicial restraint, who tries to leave social policy decisions to the people and their elected representatives where the Constitution does not clearly speak.[36]

At the completion of Bork's testimony, the Judiciary Committee heard additional testimony from a number of witnesses, both in favor of and in opposition to the confirmation. Prepared statements or testimony were provided by distinguished former and current public officials, law professors and other academics, and representatives of several interest groups. The Committee received additional materials for the record from individuals and groups who were not called to testify.[37]

After twelve days of hearings, the Judiciary Committee voted 9–5 to recommend that the full Senate reject the nomination. At that point, Reagan administration officials struggled over whether Bork should request that his name be withdrawn from consideration or press his case to a full Senate vote. Key senators had confirmed publicly that they would vote to reject him, and it was pretty clear that the nomination would be defeated. Nonetheless, Bork opted to let the nomination go to the full Senate for decision. The debate on the floor, which began on October 21, lasted almost three days. On October 23, the Senate voted 58–42 to reject the nomination, the largest margin of defeat of any Supreme Court nominee in history.[38]

The Controversy Continues

Conflict once again ensued in the administration over who the president should select as the next nominee. Both the moderates and conservatives pushed federal appellate judges, Anthony Kennedy and Douglas Ginsburg, respectively. Kennedy, a graduate of Stanford University and Harvard Law School, was serving on the Ninth Circuit Court of Appeals, to which he had been appointed in 1975 by President Gerald Ford. Kennedy was reputed to be a solid conservative, but his record did not manifest the strident conservatism of Robert Bork and other potential candidates. Ginsburg had less experience as a federal judge, having served for only one year on the D.C. Circuit. He received his undergraduate degree from Cornell University and, like Bork, was a graduate of the University of Chicago Law School. Ginsburg had been a professor at Harvard Law School for eight years, and he served in the Justice Department's anti-trust division during the Reagan administration, before being appointed to the federal bench. Ginsburg's background was so similar to Bork's that one scholar later referred to him as "Bork's protégé."[39] Once again the conservatives prevailed, and on October 29 President Reagan announced Ginsburg as his choice. The nomination ran into immediate trouble, however, when problems in his background that had not been discovered by the FBI check arose. Further examination of his background revealed several alleged conflicts of interest during Ginsburg's tenure as a Justice Department official. Most damaging, however, was evidence that he had smoked

marijuana with his students when he taught at Harvard Law School. This proved too embarrassing to Reagan administration officials, who advocated strong anti-drug policies, including the "Just Say No" campaign initiated by the president's wife. Consequently, Ginsburg's nomination was withdrawn.

After the Bork and Ginsburg disasters, on November 24 President Reagan recommended Anthony Kennedy as the nominee. Unlike the previous two nominations, Kennedy was confirmed easily, with vocal opposition from only one of the liberal interest groups that actively opposed Bork, the National Organization for Women. While Kennedy was known as a consistent conservative on the federal bench, he did not have a record of conservative writings critical of liberal Warren and Burger Court precedents. In fact, when questioned about constitutional issues Kennedy did not criticize previous decisions that expanded civil rights and liberties in such areas as freedom of expression, privacy, and equal protection. His testimony was markedly different from Bork's, and this influenced the senators who had voted to reject Bork's confirmation. After only three days of hearings, Kennedy was confirmed by a vote of 97–0.[40] In his detailed analysis of the Bork controversy, Ethan Bronner observed: "Few liberals believed that Kennedy's voting record on the high court would please them. He was clearly conservative. But his expansive reading of rights and equality made Bork's opponents feel their fight had been worthwhile."[41]

Although Anthony Kennedy turned out to be a good choice for conservatives, the Bork controversy left them bitter and angry, and they, along with other analysts, accused Bork's opponents of politicizing the Supreme Court appointment process. As noted in the introductory chapter, despite these claims the process always has been political, although perhaps not as obviously confrontational. The perception nonetheless was that the process had been forever altered, and not in a positive way. Determining the accuracy of this perception would have to await future nominations.